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# In the Supreme Court

## of the United States

OCTOBER TERM, 1975

No. 75-1626

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., OREGON-COLUMBIA CHAPTER, JOINT COUNCIL OF TEAMSTERS NO. 37, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, NORTHWEST CONCRETE PUMPING ASSOCIATION, INC., and HANS JUHR, KENNETH J. JUHR and DAN JUHR, dba JUHR & SONS, et al.,
*Plaintiffs-Petitioners,*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,
*Defendant-Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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*Plaintiffs-Petitioners,*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,
*Defendant-Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### QUESTION PRESENTED

Does a jurisdictional award of work by the NLRB automatically preempt all provisions of the losing union's collective bargaining agreement even if the employer can comply with the terms of the agreement without violating the Board's award?

## STATUTES INVOLVED

In addition to those statutes cited in the petition this case involves the following provision of the Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959:

Sec. 301(a), 29 U.S.C. § 185(a), 61 Stat. 156:

Sec. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

## STATEMENT OF THE CASE

Petitioners' statement of the case is incorrect or misleading in the following respects:

1. Petitioners infer that subcontractors employing members of Respondent, Operating Engineers Local 701 (701), cannot supply the industry's needs and perform only a small portion of the concrete pumping work in the relevant area. Such facts are not supported by the record which reflects that many contractors within 701's geographic jurisdiction employ 701 members to operate concrete pumps or subcontract such work to employers employing 701 members. In addition, while such factors may be relevant as an affirmative defense to 701's breach of contract actions against Petitioner, Associated General Contractors of America, Inc., Oregon Columbia Chapter (AGC), they are not relevant to the question of whether or not the NLRB's 10(k) decision in this case automatically preempts the subcontracting provisions of the 701-AGC Collective Bargaining Agreement.



2. Petitioners state that all interest parties appeared before the National Labor Relations Board in the hearing held under § 10(k) of the Act. This is not correct since those independent contractors employing 701 members were not represented.

3. Petitioners characterize the Court of Appeals decision in this matter as one which was entirely dependent upon the fact that there was a subcontractor versus a single employer. Such is simply not the case. The court's decision below was properly based upon its conclusion that AGC contractors could fully comply with their collective bargaining agreement with 701 without in any way subverting or violating the Board's previous 10(k) decision.

## REASONS FOR DENYING THE WRIT

The Court of Appeals decision is consistent with prior decisions of this Court and other courts of appeals. The decision strikes a proper balance between the objectives of Section 10(k) and Section 301 of the Act, since under the unique facts of this case both sections can be given their full effect without conflict.

**1. The Court of Appeals decision in this case is consistent with prior decisions of this court and of other courts of appeal, since there was no conflict between the Board's award and the collective bargaining agreement which 701 seeks to enforce in this action.**

Petitioners have cited numerous cases in support of their claim that the § 10(k) decision in this case precludes the § 301 claim of 701. A close reading of those cases, however, indicates that they are not factually similar to the one now under consideration. Those cases cited by petitioners each involve an employer with contractual commitments to two unions, who was caught in the middle of competing work assignment claims by the rival unions. (See e.g., *NLRB* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573 [1961]); *New Orleans Typographical Union No. 17* v. *NLRB*, 368 F.2d 755 [5th Cir. 1966]).

Under the unique facts of this case, the AGC employer has no agreement with the rival union (Teamsters) covering this work. In fact, the Teamsters have no claim whatsoever to the work, unless and until an AGC employer has breached its collective bargaining agreement and subcontracted work to a member of the Northwest Concrete Pumping Association (Northwest). Absent such a voluntary decision, the Teamsters have no claim to the work, either in contract or under the Board's 10(k) award. As a result, there can be no conflict between the Board's award and the collective bargaining agreement unless an AGC employer deliberately chooses to breach its collective bargaining agreement.



Thus, under the facts of this case, the decision of the Ninth Circuit Court of Appeals is entirely consistent with prior decisions of this Court, which have uniformly held that the authority of the Board over unfair labor practices does not destroy the jurisdiction of the courts in suits under § 301. (*Smith* v. *Evening News Association*, 371 U.S. 195 [1962]). The remedies of § 10(k) (Administrative award of work) and of § 301 (Damages), as well as the jurisdiction of each tribunal, are independent. [*International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237 (1952); *Fibreboard Paper Products Corporation* v. *East Bay Union of Machinists Local 1304*, 344 F.2d 300 (9th Cir. 1965), cert. den., 382 U.S. 826 (1965)]. In addition the decision below is consistent with the fundamental policy announced by this Court favoring enforcement of arbitration provisions in collective bargaining agreements. (*Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 [1957]). It is thus clear that wherever possible every effort should be made to give complete effect to the collective bargaining agreement, so long as it does not directly conflict with a prior decision of the Board. The doctrine of preemption should not be applied unless such a conflict exists. Under the unique facts of this case there is no such conflict.

**2. The Court of Appeals decision is consistent with the policies of the National Labor Relations Act.**

Petitioners devote the majority of their brief to the proposition that decision of the Ninth Circuit

Court of Appeals in this case subverts the policies underlying § 10(k) of the Act. A review of those policies reveals that the fundamental purpose of § 10(k) is to eliminate the disruption of work caused by jurisdictional strikes and to aid the employer helplessly caught in the middle of conflicting demands by rival unions. (*NLRB* v. *Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 580, 581 [1964]). It is submitted, however, that this policy will not in any way be "subverted" by a decision requiring employers to live up to the terms of their collective bargaining agreement, so long as such agreements are not in conflict with a prior jurisdictional award of work. If AGC contractors are required to hire subcontractors employing 701 members, the rival union (Teamsters) could not take economical legal action against AGC employers. This is, of course, the case, since the Teamsters (1) do not have a collective bargaining agreement covering such work, and (2) the Board's 10(k) order was limited to situations where the work had been subcontracted to members of Northwest. Thus, as pointed out above, the Teamster claim to the work arises only after an AGC employer has breached the collective bargaining agreement. If the AGC employer will not be subjected to economic action, nor to a claim for damages by the Teamsters, what public policy has been subverted by requiring them to comply with the terms of their contractual agreements.

Petitioners further argue that the Court of Appeals decision provides the means for unions to freely evade § 10(k) decisions by insisting on subcontractor



clauses. These clauses, however, are clearly permitted by the proviso to § 8(e) of the Act, and were found by Congress to be in the public interest. If a contractor, through the simple tact of subcontracting work to an employer who does not have an agreement with the union, can create a "jurisdictional dispute" all § 8(e) proviso type clauses in the construction industry would be rendered meaningless. Furthermore, in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), this Court approved contract language which preserved to the contracting union work traditionally performed by its members. Acceptance of the petitioners' position in this case would likewise render all such work preservation clauses vulnerable to the same devious tactic.

Petitioners also suggest that the Court of Appeals decision means that the "dispute" cannot be permanently settled. Such argument is deceptive and is not supported by the facts in this case. These facts are that a problem or dispute will not exist if the AGC employers comply with the terms of the 701 Collective Bargaining Agreement. Disputes will exist only so long as these employers voluntarily choose to disregard the terms of this agreement. The power to finally resolve the dispute is thus entirely within the control of the AGC employer.

The entire thrust of the National Labor Relations Act is to promote collective bargaining which culminates in private agreements, thus stabilizing the relationships between employers and employees. The Court

of Appeals decision in this case properly recognizes that if employers are free to disregard the terms of such agreements, the basic policy underlying the Act will be seriously affected. If employers are truely caught in the middle of competing unions, then certainly the policies underlying § 10(k) of the Act should relieve them from their dilemma. Here, however, the AGC employer is in the middle of a dispute only because it has voluntarily chosen to create the dispute in the first instance. Collective bargaining agreements are the heart of stable labor relationships. If employers, as they seek to do in this case, can unilaterally choose to disregard such agreements, the cornerstone of this country's labor management policies will have been destroyed. Clearly, such a result should not be approved by this Court.



## CONCLUSION

Respondent respectfully submits that the judgment of the United States Court of Appeals for the Ninth Circuit is correct, works no injustice, and is founded upon unique facts which clearly remove it from any confusion among circuits concerning the proper role of the courts in enforcing collective bargaining agreements under § 301 of the Act and the National Labor Relations Board in resolving jurisdictional disputes under § 10(k) of the Act.

Respondent therefore prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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